



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, D.C. 20463

Patrick J. Rodgers, Esq.  
Modrall Sperling Roehl Harris & Sisk P.A. **MAY 29 2009**  
P.O. Box 2168  
Albuquerque, NM 87103-2168

RE: MUR 6120  
Republican Campaign Committee of New  
Mexico and John Chavez, in his official  
capacity as treasurer

Dear Mr. Rodgers:

On November 5, 2008, the Federal Election Commission notified your client, the Republican Campaign Committee of New Mexico, and John Chavez, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 20, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe the Republican Campaign Committee of New Mexico and John Chavez, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a), 441a(f), 441b(a) and 434(b). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Kathryn Lefeber, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Susan L. Lebeaux".

Susan L. Lebeaux  
Assistant General Counsel

Enclosure

Factual and Legal Analysis for the Republican Campaign Committee of New Mexico

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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7 **RESPONDENTS:** Republican Campaign Committee of New Mexico **MUR 6120**  
8 and John Chavez, in his official capacity as treasurer  
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10 **I. INTRODUCTION**

11 This matter was generated by a complaint filed with the Federal Election Commission by  
12 Brian S. Colón, Chairman of the Democratic Party of New Mexico. *See* 2 U.S.C. § 437g(a)(1).  
13 The complaint alleges several violations of the Federal Election Campaign Act of 1971, as  
14 amended ("the Act"), stemming from two television advertisements, "Can't Trust" and "Asked  
15 to Explain," criticizing Martin Heinrich, a candidate for U.S. House of Representatives in New  
16 Mexico's First Congressional District. Specifically, the complaint alleges that "Can't Trust,"  
17 reported as an independent expenditure by the Republican Campaign Committee of New Mexico  
18 ("RCCNM"), was coordinated with Darren White and Darren White for Congress ("White  
19 Committee"), Martin Heinrich's opponent, resulting in an excessive contribution. Complaint at  
20 3. The complaint further alleges that "Asked to Explain," reported as an electioneering  
21 communication by Freedom's Watch, Inc. ("Freedom's Watch"), a nonprofit corporation, was  
22 coordinated with the RCCNM, resulting in an excessive and prohibited contribution. *Id.* at 4.  
23 Based on the coordination allegations, the complaint also alleges that the RCCNM may have  
24 failed to properly report coordinated communications to the Commission. *Id.* The response  
25 from the RCCNM denies any coordination.

26 As discussed in more detail below, it appears that neither "Can't Trust" nor "Asked to  
27 Explain" were coordinated communications because neither meet the conduct prong of the  
28 Commission's coordinated communications regulations. Therefore, the Commission finds no

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reason to believe that the RCCNM made excessive contributions in violation of 2 U.S.C. § 441a(a), no reason to believe that the RCCNM accepted excessive contributions in violation of 2 U.S.C. § 441a(f), and no reason to believe that the RCCNM accepted prohibited contributions in violation of 2 U.S.C. § 441b(a). Further, the Commission finds no reason to that the RCCNM failed to properly report coordinated communications in violation of 2 U.S.C. § 434(b), and close the file.

**II. FACTUAL AND LEGAL ANALYSIS**

**a. Facts**

"Can't Trust" began airing on October 14, 2008, on New Mexico television stations. The advertisement features images of candidate Martin Heinrich and states "[w]e just can't trust Martin Heinrich." The advertisement further claims that "it's a disgrace" that Heinrich smeared his opponent, a former soldier, and discusses Heinrich's stance on issues related to troops in Iraq. The RCCNM disclosed to the Commission on its 2008 Pre-General Report that it made disbursements of \$240,000 and \$100,000 on October 14 and 15, 2008, respectively, to Stevens, Reed, Curcio & Potholm ("SRCP"), the media firm that created "Can't Trust," for independent expenditures that oppose Martin Heinrich's candidacy.

The complaint's allegation that the RCCNM coordinated with Darren White and the White Committee in producing "Can't Trust" is based on White's New Mexico Republican Party ("NMRP") Executive Committee membership. Complaint at 4. It asserts that as a result of this affiliation, the RCCNM, the federal committee of the NMRP, would not have aired an advertisement without assent, material involvement of, or substantial discussion with, White or one of his agents. *Id.* Attached to the complaint is a list of the thirty-nine NMRP Executive Committee members, including White. *Id.*, Attachment 1. The complaint alleges that because of

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1 the purported coordination, RCCNM made, and White and the White Committee accepted, an  
2 excessive, in-kind contribution. *Id.*

3 The response from the RCCNM denies any coordination related to "Can't Trust." In its  
4 response, the RCCNM states that RCCNM hired an independent consultant, Ben Burger at  
5 SRCP, to run its independent expenditure program separate from the RCCNM. RCCNM  
6 Response at 3. Burger avers in an attached affidavit that he hired his own staff, designed the ads,  
7 hired and supervised the media consultants who bought the time and filmed the ads, and  
8 supervised the selection of the stations and broadcast times for the ad. Burger Aff. ¶ 4. RCCNM  
9 additionally asserts that it maintained a firewall to prevent coordination with White and the  
10 White Committee. *Id.* According to the RCCNM, the firewall strictly prohibited Burger and his  
11 staff from contacting or receiving information not publicly available from any of the benefiting  
12 campaigns or their agents about any aspect of the campaigns' strategy or political advertising.  
13 *Id.* Only RCCNM's legal counsel was authorized to contact Burger for legal compliance  
14 purposes. *Id.* In addition, information obtained by the Commission indicates that the NMRP  
15 Executive Committee has not had a meeting since December 2007, well over a year before the  
16 advertisement aired, and that Darren White did not attend that meeting.

17 "Asked to Explain" began airing on October 15, 2008, on New Mexico television  
18 stations. The advertisement features images of Heinrich and states that he "skirted" ethics laws  
19 while on the city council and as a lobbyist. It instructs viewers to call Heinrich and ask him to  
20 support the State Ethics Commission Act. On FEC Form 9, 24 Hour Notice of Disbursements  
21 for Electioneering Communications, dated October 15, 2008, Freedom's Watch disclosed that it  
22 disbursed \$9,997 on October 10, 2008, to SRCP for "media production" of "Asked to Explain."  
23 The complaint alleges that "Asked to Explain" was a coordinated communication because both

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Freedom's Watch and the RCCNM used the same vendor, SRCP, to produce television advertisements criticizing Martin Heinrich; both advertisements used the same two images of Heinrich; and because Carl Forti, a former National Republican Congressional Committee ("NRCC") employee, is now a Freedom's Watch employee. As a result of the coordination, the complaint alleges, Freedom's Watch made, and RCCNM accepted, an excessive and prohibited in-kind contribution. *Id.*

The response from the RCCNM denies any coordination related to "Asked to Explain." The response states that the firewalled independent expenditure program used to produce "Can't Trust," also protected it from coordination with Freedom's Watch in "Asked to Explain." RCCNM Response at 4. Ben Burger avers that "[a]t no time while I was employed by RCCNM did I share any information with any agents or employees of Freedom's Watch...." Burger Aff. ¶ 8. He also states that he did not witness any other information sharing between RCCNM and Freedom's Watch. *Id.* Finally, he stated that the image of Martin Heinrich that appeared in the "Asked to Explain" advertisement and the "Can't Trust" advertisement was obtained from a Google search of publicly available information. *Id.* ¶ 7.

Information obtained by the Commission indicates that that while SRCP worked for both Freedom's Watch and RCCNM, SRCP followed a strict firewall policy compliant with the Commission's guidance. Paul Curcio, the SRCP partner who assisted Freedom's Watch in creating "Asked to Explain," avers that he adhered to the firewall policy and did not work on RCCNM's "Can't Trust," or even know of its existence, until it aired publicly, despite it being produced by his firm. Curcio further avers that he had no communication with the RCCNM or his partner Ben Burger regarding "Asked to Explain." *Id.* In addition, he avers that he personally found the photographs of Martin Heinrich used in "Asked to Explain" from an

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independent internet search and did not share them. *Id.* ¶ 8. Finally, information obtained by the Commission indicates that while Carl Forti, Freedom's Watch's Executive Vice President of Issue Advocacy, was a former senior NRCC employee, he ended his work at the NRCC on December 31, 2006, well before the 120-day window in the Commission's regulations within which communications are considered coordinated when paid for by a former employer. See 11 C.F.R. § 109.21(d)(5).

On the assumption that there was coordination between Freedom's Watch and RCCNM, the complaint also alleges that Freedom's Watch made expenditures in excess of \$10,000 but failed to register as a political committee with the Commission. Finally, the complaint alleges that the White Committee, RCCNM, and Freedom's Watch may have failed to properly report their alleged coordinated communications to the Commission. Complaint at 4. The RCCNM denies these allegations because they maintain that there was no coordination in conjunction with "Can't Trust" or "Asked to Explain."

**b. Legal Analysis**

**1. Coordination**

The two central issues in this matter are whether the RCCNM's advertisement, "Can't Trust," was coordinated with Darren White or the White Committee resulting in an excessive contribution and whether Freedom's Watch's advertisement, "Asked to Explain," was coordinated with RCCNM, resulting in an excessive and prohibited contribution. The Act provides that coordinated communications, those made by any person "in cooperation, consultation, or concert, with or at the request or suggestion of," a candidate, the candidate's authorized political committee, or of a state committee of a political party, are considered a contribution to that candidate or committee. 2 U.S.C. § 441a(s)(7)(B)(i) and (ii), 11 C.F.R.

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§ 109.21(b)(1). As described in more detail below, it appears that neither “Can’t Trust” nor “Asked to Explain” were coordinated communications, and, therefore, neither advertisement constituted a contribution.<sup>1</sup>

#### A. “Can’t Trust”

Under the Commission’s regulations, a political party communication is coordinated with a candidate, a candidate’s authorized committee, or agent of the candidate and therefore constitutes an expenditure on behalf of the candidate, when the communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.37: (1) the communication is paid for by a political party committee or its agent; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.37(a)(2); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d).

“Can’t Trust” satisfies the first prong of the political party coordinated communications test because the RCCNM paid for “Can’t Trust.” It also meets the content prong because the television advertisement was a public communication that referred to candidate Martin Heinrich, and was publicly disseminated in Heinrich’s jurisdiction on or around October 14, 2008, fewer than 90 days before the November 4, 2008, general election. *See* 11 C.F.R. § 109.37(a)(2), *see also* 11 C.F.R. § 100.26 (a “public communication” includes “a communication by means of any broadcast, cable, or satellite communication”).

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<sup>1</sup> The U.S. District Court for the District of Columbia held that the Commission’s revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. *See Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. 2007) (granting in part and denying in part the respective parties’ motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

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1           While "Can't Trust" meets the first and second prongs of the coordination test, it does not  
2 meet the conduct prong. The third prong requires one of six types of conduct to occur: (1) the  
3 communication is "created, produced, or distributed at the request or suggestion of a candidate or  
4 an authorized committee," or the communication is created, produced, or distributed at the  
5 suggestion of the payor and the candidate or authorized committee assents to the suggestion;  
6 (2) the candidate, his or her committee, or their agent is materially involved in the content,  
7 intended audience, means or mode of communication, the specific media outlet used, or the  
8 timing or frequency of the communication; (3) the communication is created, produced, or  
9 distributed after at least one substantial discussion about the communication between the person  
10 paying for the communication or that person's employees or agents, and the candidate or his or  
11 her authorized committee, his or her opponent or opponent's authorized committee, a political  
12 party committee, or any of their agents; (4) a common vendor uses or conveys information  
13 material to the creation, production, or distribution of the communication; (5) a former employee  
14 or independent contractor uses or conveys information material to the creation, production, or  
15 distribution of the communication; and (6) the dissemination, distribution or republication of  
16 campaign materials. 11 C.F.R. § 109.21(d).

17           White's membership on the Executive Committee of the NMRP is the sole basis for the  
18 complaint's allegation that White and the White Committee coordinated "Can't Trust" with the  
19 RCCNM, the NMRP's federal committee. Complaint at 4. However, information obtained by  
20 the Commission indicates that White had no part in creating nor did he assent to the creation and  
21 airing of "Can't Trust." We have no evidence to the contrary, and no information that any of the  
22 other conduct standards have been met. See MUR 5754 (MoveOn.org Voter Fund)(finding no  
23 reason to believe coordination between MoveOn.org and John Kerry for President Inc. had



occurred because there was no specific information that suggested the conduct prong had been triggered). Based on the foregoing analysis, the conduct prong is not satisfied, and therefore "Can't Trust" is not a coordinated communication.

#### **B. "Asked to Explain"**

Under the Commission's regulations, a communication is coordinated with a political party committee or an agent of the committee and therefore constitutes an expenditure on behalf of the political party committee, when the communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.21: (1) the communication is paid for, in whole or in part, by a person other than that political party committee; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d). See discussion *supra* pp. 6-7.

"Asked to Explain" satisfies the first prong because Freedom's Watch paid for the advertisement. It also satisfies the content prong because "Asked to Explain," a television advertisement, was a public communication that refers to a clearly identified House candidate, Martin Heinrich, and was publicly disseminated in Heinrich's jurisdiction on or around October 15, 2008, less than 90 days before the November 4, 2008, general election. See 11 C.F.R. § 100.26.

The complaint alleges that Freedom's Watch and RCCNM met the conduct prong with respect to "Asked to Explain" in three ways. First, the complaint alleges that the same two images of Martin Heinrich appeared in both RCCNM's advertisement, "Can't Trust" and in Freedom's Watch's advertisement, "Asked to Explain." Second, the complaint alleges that the conduct prong was met because a common vendor, SRCP, used material information in the RCCNM advertisement and then used the same information in the Freedom's Watch

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1 advertisement. Third, the complaint alleges that the conduct prong was met because Freedom's  
2 Watch is run by a former NRCC employee. The available information does not support the  
3 complaint's allegations.

4 First, regarding the common images of Heinrich, it appears that the safe harbor for  
5 information from publicly available sources protects both RCCNM and Freedom's Watch. The  
6 Commission's regulations specifically state that the conduct prong is not satisfied "if the  
7 creation, production, or distribution of the communication was obtained from a publicly  
8 available source." 11 C.F.R. § 109.21(d)(2)-(5), *see also Coordinated Communications*, 71 Fed.  
9 Reg. 33190, 33205 (June 8, 2006). Ben Burger, producer of "Can't Trust" avers that the "image  
10 of Martin Heinrich that appeared in the 'Asked to Explain' advertisement and the 'Can't Trust'  
11 advertisement was obtained from a public source (internet image search using GOOGLE)."  
12 Burger Aff. ¶ 7. Similarly, Paul Curcio, producer of "Asked to Explain" avers that he "identified  
13 the image of Martin Heinrich used in 'Asked to Explain' by conducting an internet search of  
14 images from the public domain and gathered that image for use in 'Asked to Explain' from a  
15 publicly available source." Curcio Aff. ¶ 8. The Commission was able to locate one of the  
16 Heinrich images used in the advertisements through a Google image search. Although the  
17 Commission could not locate the other image, that is not dispositive because Google image  
18 searches locate images posted online, which may be removed. Thus, based on the affidavits of  
19 Burger and Curcio, it appears that both RCCNM's and Freedom's Watch's use of the same two  
20 images falls under the safe harbor for information from publicly available sources, and does not  
21 meet the conduct standard.

22 Moreover, the use of the same images of Martin Heinrich in both advertisements does not  
23 meet the conduct prong because it appears that the Commission's safe harbor for establishment

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1 and use of a firewall was applicable. *See* 11 C.F.R. § 109.21(h), *see also Coordinated*  
2 *Communications*, 72 Fed. Reg. 33190, 33207. Information available to the Commission  
3 indicates that SRCP and Freedom's Watch designed and implemented effective firewalls that  
4 prohibited the flow of information between employees providing services to Freedom's Watch  
5 and those employees providing services to the RCCNM. Curcio, who worked on "Asked to  
6 Explain," averred that as a result of the policy, he had no knowledge that Ben Burger, his SRCP  
7 colleague, had been engaged by RCCNM to create "Can't Trust," until he saw the broadcasts.  
8 Curcio Aff. ¶ 4. Curcio further averred that he had no communication regarding the  
9 advertisements with Ben Burger. *Id.*

10 Attached to the RCCNM's response are affidavits from Ben Burger and Matthew  
11 Kenicott, former Executive Director of the RPNM, which further describe the SRCP firewall.  
12 Ben Burger averred that he and his SRCP employees were strictly prohibited from contacting or  
13 receiving any information not publicly available from any of the benefitting campaigns,  
14 including the RCCNM and Freedom's Watch. Burger Aff. ¶ 5. The RCCNM further restricted  
15 Burger's communications by only allowing RCCNM's legal counsel to contact Burger, in an  
16 effort to ensure that RCCNM staff who could have had any contact with any political candidate  
17 or campaign did not share information with Burger. Burger Aff. ¶ 6, Kenicott Aff. ¶ 6.  
18 Information obtained by the Commission indicates that Freedom's Watch had its own vendor  
19 firewall policy, which states that each "FW vendor is prohibited from discussing the FW issue  
20 advocacy program with a...political party committee."

21 Thus, based on the public availability and firewall safe harbors, the two images of  
22 Heinrich used in both advertisements do not appear to meet the conduct standard. *See* MUR  
23 5743 (Sutton) (identical photographs used in direct mailers and on Congresswoman's website did

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1 not satisfy the conduct prong because affidavits stated that there was no coordination, the images  
2 were from a publicly available source, and a firewall was in place).

3 Second, the use of a common vendor, in and of itself, has not been found by the  
4 Commission to be sufficient to meet the conduct prong of the coordination test. See MUR 6050  
5 (Boswell) (Commission found that merely having a common vendor without more is not  
6 sufficient to establish coordination). The Commission's regulations require three elements, in  
7 relevant part, for a common vendor to satisfy the conduct prong: (1) the person paying for the  
8 communication employed a commercial vendor, as defined in section 116.1, to create, produce  
9 or distribute the communication; (2) the commercial vendor developed a media strategy,  
10 developed the content of, and produced, a public communication, and selected personnel to  
11 provide the services to a political party committee within the past 120 days; and (3) the  
12 commercial vendor used or conveyed to the person paying for the communication, information  
13 about the political party committee that is material to the creation, production, or distribution of  
14 the communication. 11 C.F.R. § 109.21(d)(4)(i)-(iii).

15 SRCP's relationship with Freedom's Watch and with the RCCNM appears to satisfy only  
16 the first two of the three common vendor elements. The first requirement is fulfilled because  
17 Freedom's Watch, the payor for "Asked to Explain," contracted with SRCP, a commercial  
18 vendor, to create, produce and distribute the advertisement. Curcio Aff. ¶ 1, see 11 C.F.R.  
19 § 116.1(c). The second element is met because SRCP provided creative and strategic services to  
20 the RCCNM during the same time-period it was providing similar services to Freedom's Watch.

21 The third common vendor element is not met, however, because there is no information  
22 suggesting that SRCP used or conveyed material information about RCCNM or "Can't Trust" to  
23 Freedom's Watch. The complaint only states the use of a mutual vendor "further suggests"

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1 information sharing, but does not indicate what information, other than the identical pictures of  
2 Heinrich discussed *supra*, was actually shared. In fact, the substance of "Can't Trust" deals with  
3 an entirely different issue than "Asked to Explain." The only similarity is the two images that  
4 appear in both advertisements. See Complaint, Attachment 4. In addition, even if the common  
5 vendor elements were met, the firewall described *supra* would have further prevented  
6 information sharing. See 11 C.F.R. § 109.21(h). Therefore, it does not appear that the mutual  
7 use of SRCP as a vendor for the production of "Can't Trust" and "Asked to Explain" satisfies the  
8 conduct prong.

9 Finally, the complaint alleges that the conduct prong is met because a former NRCC  
10 employee is now a Freedom's Watch employee. For a former employee to satisfy the conduct  
11 prong, the Commission's regulations require, in relevant part, that: (1) a communication is paid  
12 for by the employer of a person who was an employee of a political party committee, during the  
13 previous 120 days; and (2) that the former employee uses or conveys to the person paying for the  
14 communication information about the political party committee, or information used by the  
15 former employee in providing services to the political party committee, and the information  
16 conveyed is material to the creation, production, or distribution of the communication.  
17 11 C.F.R. § 109.21(d)(5).

18 Information obtained by the Commission indicates that Carl Forti, Freedom Watch's  
19 Executive Vice President of Issue Advocacy, previously worked at the NRCC, but ended his  
20 employment on December 31, 2006. Forti became Freedom's Watch's Executive Vice President  
21 in March 2008. Since Forti was not employed by the NRCC, or the RCCNM, within 120 days of  
22 his employment at Freedom's Watch, the first requirement is not satisfied. Further, the  
23 complaint provides no information otherwise indicating that Forti conveyed information to

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Freedom's Watch that was material to the RCCNM or that it was used in "Asked to Explain," to fulfill the second requirement. Based on the foregoing analysis, the conduct prong is not satisfied, and therefore "Asked to Explain" is not a coordinated communication.

### C. Conclusion

Since neither "Can't Trust" nor "Asked to Explain" were coordinated communications under the Commission's regulations, neither advertisement was an in-kind contribution. Therefore, the Commission finds no reason to believe that the Republican Campaign Committee of New Mexico and John Chavez, in his official capacity as treasurer, made an excessive contribution in violation of 2 U.S.C. § 441a(a), in connection with "Can't Trust." Further, the Commission finds no reason to believe that the Republican Campaign Committee of New Mexico, and John Chavez, in his official capacity as treasurer, accepted an excessive or prohibited contribution in violation of 2 U.S.C. § 441a(f) and 2 U.S.C. § 441b(a), in connection with "Asked to Explain."

### 2. Reporting

The remaining allegation, that the RCCNM failed to properly report coordination to the Commission, is based on the complaint's coordination allegations. Since it appears that "Can't Trust" and "Asked to Explain" were not coordinated communications, the Commission finds no reason to believe that the Republican Campaign Committee of New Mexico and John Chavez, in his official capacity as treasurer, failed to properly report coordinated communications to the Commission in violation of 2 U.S.C. § 434(b).

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